Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON T. RIBAUDO,
PRIVATE, UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Section 871 of Title 10, United States Code, Congress requires the United States Court of Appeals for the Armed Forces to review or reject all petitions arising from the decision by a service Court of Criminal Appeals before a military service can carry out a punitive discharge or death sentence. Appellant died after the Navy-Marine Corps Court of Criminal Appeals decided his case, but before he had an opportunity to present his petition to the Court of Appeals for the Armed Forces. The Court of Appeals for the Armed Forces allowed the Department of the Navy to execute Appellant's punitive discharge adjudged at trial without civilian review of his petition. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction to establish a uniform policy of abatement *ab initio* for all military service courts?

2. Whether in light of *Halbert v. Michigan*, 125 S. Ct. 2582 (2005), the current policy of abatement *ab initio* established by the Court of Appeals for the Armed Forces is correct in light of its statutory responsibilities.

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PETITION FOR A WRIT OF CERTIORARI

Appellant petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces entered in his case on January 24, 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-10a) is reported at 62 M.J. 286. The *en banc* opinion of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 11a-17a) is reported at 60 M.J. 691. A prior opinion of the Navy-Marine Corps Court of Criminal Appeals affirming Petitioner's court-martial conviction (App., *infra*, 18a-19a) is unreported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Forces was entered on January 24, 2006. A motion to reconsider was denied on February 15, 2006. This jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are reproduced at App., *infra*, 20a-22a.

STATEMENT

A special court-martial composed of a military judge alone tried Appellant on February 20, 2003. In accordance with his pleas, Appellant was convicted of unauthorized absence, wrongful drug use, and breaking restriction in violation of Articles 86, 112(a), and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 912(a), 934. He was sentenced to confinement for one hundred days, forfeiture of $766.00 pay per month for a period of three months, and a bad-conduct discharge. The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence. App., *infra,* 18-19a.

Appellant subsequently died within the sixty-day time period of filing a petition to the United States Court of Appeals of the Armed Forces. Appellate defense counsel subsequently filed a motion to reconsider before NMCCA asking the court to abate the proceedings *ab initio*. Sitting *en banc,* NMCCA affirmed the prior findings and sentence. The court held that its mandatory review function pursuant to Article 66, UCMJ, 10 U.S.C. § 866 was concluded after Appellant's decision had been rendered. *Id. at* 11a-17a.

Without review of Appellant's petition on the merits, the United States Court of Appeals for the Armed Forces affirmed the service court's decision and established a new uniform policy of abatement *ab initio* for all military courts. *Id.* at 1a-10a. The decision allowed the Department of the Navy to carry out Appellant's adjudged punitive discharge. *Id.* at 10a.

The court of appeals concluded that its review was an appeal of discretion and that only review before a service court was an appeal of right. The court of appeals noted that an earlier decision recognized that the court's jurisdiction under Article 67, UCMJ, 10 U.S.C. 867(a)(3) (*Id.* at 20a.)

was unique when compared with that of other federal appellate courts. The court of appeals also reasoned that its jurisdiction was "more akin" to that exercised by the United States Supreme Court under its certiorari jurisdiction. *Id.* at 1a-10a. Despite being raised by Appellant, the court of appeals failed to address 10 U.S.C. § 871.

REASONS FOR GRANTING THE PETITION

The court of appeals invalidated an Act of Congress based upon an unspecified plenary power. By doing so, the court of appeals deprived Appellant his statutory right to aver his honorable service before the highest military court in the nation. The court of appeal's decision also conflicts with the unanimity of the civilian federal circuit courts of appeals that currently follow abatement *ab initio*. The court's expansion of its jurisdiction to establish a uniform legal policy absent authority by Congress was error. Accordingly, this Court's review is warranted.

1. Appellant was deprived of his right to civilian review before the highest military court in the nation. All parties agree that pursuant to Article 71, UCMJ, 10 U.S.C. § 871, the Department of the Navy cannot carry out Appellant's adjudged bad-conduct discharge without the Court of Appeals for the Armed Forces reviewing his petition for appeal. App., *infra,* 21-22a.

But the court of appeals ignored the statute in cases where appellants die during the appellate process. The court of appeals found that Article 71, UCMJ, 10 U.S.C. § 871, "no more compels that we adopt a policy of abatement ab initio than it compels the United States Supreme Court to have such a policy with respect to its review of military convictions." *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003).

This was error. There is no indication that Congress

desired any exceptions to Article 71, UCMJ, 10 U.S.C. 871. To the contrary, the legislative history reveals that Congress intended for the Court of Appeals for the Armed Forces to review all petitions that are submitted to the court. *Uniform Code of Military Justice: Hearing on H.R. 2498 Before the House Comm. on Armed Services, Subcomm. No. 1,* 81st Cong. 759 (March 14, 1949).[1] Before any adjudged punitive discharge was carried out, Congress desired both a military and civilian appellate court to independently review the court-martial.

Civilian oversight is a fundamental tenant of the American military system and a necessary check on the powers of the military. To arbitrarily stop the appellate review process without civilian review prejudices a large amount of appellants who could have otherwise had their cases reversed. *See, e.g., United States v. Jones,* 61 M.J. 80 (C.A.A.F. 2005) (Civilian appellate court disagreeing with service court over prejudice from unreasonable posttrial delay).

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[1] Colonel OLIVER. And in your bill last year, Mr. Elston, you provided for some additional formal review, without going into the details, to be certain that there was a complete review.

Mr. ELSTON. I appreciate that, and that was because we wanted to be certain that there was a complete review.

Colonel OLIVER. That is right.

Mr. ELSTON. Of every case.

Colonel OLIVER. That is right.

By ignoring a statute of Congress and establishing its own military-wide policy on abatement *ab initio*, the court of appeals has invoked a previous unrecognized plenary power over the service courts. The decision by the court of appeals extended its policy to all uniform service courts. App., *infra*, 10a. The court of appeals relied on the fact that abatement *ab initio* was a matter of policy instead of a matter of law. *Id. at* 10a. *See also Rorie*, 58 M.J. at 405.

This Court has noted that the Court of Appeals for the Armed Forces was not given authority by Congress to oversee all matters arguably related to military justice or to act as a plenary administrator even of criminal judgments it has affirmed. *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999). The Court of Appeals for the Armed Forces can take actions only with respect to matters of law. App., *infra*, 21a. Appellant's decision asserted a broad, erroneous view of an unspecified plenary power that falls outside the limits of both Article 67, UCMJ, 10 U.S.C. § 867 and this Court's decision in *Goldsmith*.

In sum, only Congress has the power to establish policy over the military courts. The Court of Appeals for the Armed Forces ignored clear statutory language by establishing a military-wide policy of abatement *ab initio*.

2. The Court of Appeals for the Armed Forces is the only federal court of appeals that does not follow abatement *ab initio*.

While this Court has never outlined a rational for abatement *ab initio*, the federal circuits have uniformly found that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him. *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977). *See also John H. Derrick, Annotation, Abatement Effects of Accused's*

Death Before Appellate Review Of Federal Criminal Convictions, 80 A.L.R. Fed. 446 (2004). All federal circuits agree that only when an appeal of right is completed that the interests of justice have been served. *United States v. Wright*, 160 F.3d 905, 908 (2d Cir. 1998).

The court of appeal's self-classification of Petitioner's appeal as an appeal of discretion is erroneous in light of its statutory responsibilities. The court of appeals based its decision on the fact that it considered itself a court of discretionary review. The court of appeals relied upon the discretionary nature of its docket to conclude that its jurisdiction was more akin to this Court. App., *infra,* 5a.

The court of appeals' classification conflicts with this Court's decision in *Halbert w. Michigan*, 125 S. Ct. 2582 (2006). In *Halbert,* the Michigan Court of Appeals changed its procedural rules to a petition-based system. Relying on the discretionary nature of its docket, the state of Michigan argued that appellants did not need to be afforded counsel as the appeal was now discretionary. *Id.* at 2588, 2591.

This Court rejected Michigan's reliance on the procedural rules of the appellate court and instead focused on the function of the court. The court noted that the function of the Michigan Court of Appeals is to look to the merits of the claims made in the application. It is a court focused on correcting legal errors. In contrast, a discretionary review is to an appellate court that is focused on matters other than errors by a lower court, e.g., the involvement of a matter of significant public interest. *Id.* at 2591.

As this Court recently made clear, the question whether a appeal is one of right or discretion turns on the function of the court. Congress did not intend to create a right of discretionary review when it passed 10 U.S.C. § 867. Instead, Congress intended for a review from both a military and civilian appellate court. *Uniform Code of Military*

Justice: Hearing on H.R. 2498 Before the House Comm. on Armed Services, Subcomm. No. 1, 81st Cong. 759 (March 14, 1949)).

In the federal appellate system, there is only one Court that is a court of discretionary review. Article 67a, 10 U.S.C. 867a, permits this Court to review decisions by the Court of Appeals for the Armed Forces. Thus it was error for the court of appeals to conclude that it possessed the power to establish national legal policy for the military when Congress permitted this Court to review its decisions.

The court of appeals' decision raises matters fundamental to the rights bestowed by Congress to servicemembers. Great deference is owed to the judgments of the political branches in this area. *See, e.g., Weiss v. United States,* 510 U.S. 163, 177 (1994) ("Judicial deference ... 'is at its apogee' when reviewing congressional decisionmaking" in the military context) (quoting *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981)); *Loving v. United States,* 517 U.S. 748, 768-73 (1996). Despite that principle, the Court of Appeals for the Armed Forces, an Article I court, ignored an Act of Congress exercising the Legislative Branch's power under the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14 – and did so by extending its jurisdiction to a function reserved only for this Court alone. This holding warrants this Court's review.